82 - 2089

No.

Office - Supreme Court, U.S.
FILED
JUN 17 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1982

MICHAEL F. BEAUSANG, JR. and ACADEMY LIFE INSURANCE COMPANY,

Petitioners,

vs.

LEO M. MULLEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM J. BRENNAN
BUTERA, BEAUSANG, MOYER & COHEN
Attorneys for Petitioners
700 Valley Forge Plaza
King of Prussia, Pennsylvania 19406
(215) 265-0800

8718
Lyts Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587
MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 221-0008

QUESTION PRESENTED

Whether the statutory appraisal remedy to a dissenting shareholder is exclusive in a "cash-out" short form corporate merger in which a New Jersey insurer is acquired by an affiliated parent insurer, and where the merger was approved by the New Jersey Insurance Commissioner.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations ii

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 2

Reason for Granting the Writ:

The Court of Appeals for the Eighth Circuit decided an important question of New Jersey corporate law, and corporate law in general, in conflict with applicable state corporate law and in a manner detrimental to the free management of corporate affairs. 5

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Berkowitz v. Power Mate Corp., 135 N.J. Super. 36 (1975) 9, 10

Contents

Page

Blumenthal v. Roosevelt Hotel, Inc., 202 Misc. 988, 115 N.Y.S. 2d 52 (Sup. Ct. 1952) 10

Coleman v. Taub, 638 F. 2d 628 (3rd Cir. 1981) 6

Cort v. Ash, 422 U.S. 66 (1975) 6

Mills v. Electric Auto-Lite Co., 552 F. 2d 1239 (1976), cert. denied, 434 U.S. 922 (1977), reh. denied, 434 U.S. 1002 (1977) 8

Personal Credit Plan v. Kling, 130 N.J. Eq. 41 (1941) ... 11

Roland International Corp. v. Najjar, 407 A. 2d 1032 (Del. 1979) 7

Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) 6

Singer v. Magnavox and Cash Take Out Mergers, 64 Va. L. Rev. 1101 (1978) 9

Singer v. Magnavox Co., 380 A. 2d 969 (Del. 1977) 6, 7, 8

Stauffer v. Standard Brands Incorporated, 187 A. 2d 78 (Del. 1962) 7, 8

Weinberger v. UOP, Inc., No. 58, 1981 slip. op. (Del. Feb. 1, 1983) 6, 7, 8

Statutes Cited:

28 U.S.C. §1254(1) 2

Contents

Page

28 U.S.C.§1332 4

N.J.S.A. 14A:11-5 — 14A:11-10 10

N.J.S.A. 14A:11-5(22) 10

41 N.J.S.A. 14:12-1 11

N.J.S.A. 17:27B-1 to -6 .....2, 10, 12, 13, 14

Other Authorities Cited:

Brudney and Chirelstein, A Restatement of Corporate Freeze Outs, 87 Yale L.J. 1354 (1978) 9

Vorenberg, Exclusiveness of the Dissenting Stockholders' Appraisal Rights, 77 Harv. L.R. 1189 (1964) 14, 15

APPENDIX

Appendix A — Order of the United States Court of Appeals for the Eighth Circuit Denying Rehearing..... 1a

Appendix B — Opinion of the United States Court of Appeals for the Eighth Circuit 2a

Appendix C — Opinion of the United States District Court for the Western District of Missouri 11a

Appendix D — The Insurance Merger Act..... 15a

No.

In The

Supreme Court of the United States

October Term, 1982

MICHAEL F. BEAUSANG, JR., AND ACADEMY LIFE INSURANCE COMPANY,

Petitioners,

vs.

LEO M. MULLEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Michael F. Beausang, Jr. and Academy Life Insurance Company respectfully pray that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 2, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears as Appendix B, *infra*. The opinion of the District Court

for the Western District of Missouri also not yet reported appears as Appendix C, *infra*.

JURISDICTION

The order of the United States Court of Appeals for the Eighth Circuit was entered on March 2, 1983. A timely petition for rehearing by a panel of judges was denied on March 23, 1983 and this petition for certiorari was filed within 90 days of that date. A copy of the order of the Court of Appeals denying rehearing appears as Appendix A, *infra*. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

N.J. Stat. Ann. §§17:27B-1 to -6 (West Supp. 1982-1983) ("The Insurance Merger Act"). A copy of the Insurance Merger Act is attached hereto as Appendix D.

STATEMENT OF THE CASE

The Academy Life Insurance Company ("Academy Life") is a Colorado insurer with a principal administrative office located at One Valley Forge Plaza, Valley Forge, Pennsylvania. Academy Life is a wholly owned subsidiary of Academy Insurance Group, Inc., a Pennsylvania corporation with offices also located at One Valley Forge Plaza, Valley Forge, Pennsylvania. Michael F. Beausang, Jr. is the duly appointed corporate Secretary of Academy Life ("Beausang"). During 1980, Pension Life Insurance Company of America ("Pension Life") was a duly licensed and lawfully chartered New Jersey insurance company and during 1980 97.55% of its outstanding capital stock was owned by Academy Life. Leo M. Mullen ("Mullen") is an individual who resides in Kansas City, Missouri.

At various times during 1964 and in various quantities, Mullen purchased a total of 695 shares of the common stock of Pension Life. Mullen does not recall the purchase price of any of the shares, or any circumstances surrounding the purchase, except that the shares were mailed to him by a broker from Philadelphia, Pennsylvania.

In 1977, there were 560,137 shares of the common stock of Pension Life outstanding, and no other share or class of capital stock outstanding. At that time, Academy Life owned 537,442 shares of the common stock of Pension Life, and other persons owned 22,695 shares. During September 1977, Academy Life purchased 8,950 shares of the common stock of Pension Life for a purchase price of $8 per share from unaffiliated persons who were then shareholders of Pension Life, leaving 13,745 shares of the common stock of Pension Life owned by other shareholders, constituting approximately 2.45% of the total shares of Pension Life then outstanding.

As of June 30, 1980, Academy Life did not own the remaining 13,745 shares of the common stock of Pension Life. In an effort to acquire such shares for appropriate business purposes, Academy Life made an application with the Insurance Commissioner of the State of New Jersey and filed a Plan of Acquisition of Minority Shares, pursuant to the Insurance Merger Act which establishes a short form merger procedure for parent companies to acquire subsidiary insurance companies. The plan provided for a "cash-out" payment of $8 per share and was duly approved by the New Jersey Commission of Insurance. Academy Life sent notice of the Approval of the Plan of Acquisition as well as information regarding exercise of appraisal rights to all minority shareholders during September of 1980. The Insurance Merger Act provides a 30 day period for the exercise of appraisal rights. Mullen wrote a letter dated September 14, 1980 apparently dissenting to the valuation procedure, but he did not pursue his statutory appraisal

rights as set forth in, and as required by, the Insurance Merger Act by commencing an action in the Superior Court for the State of New Jersey on or before October 4, 1980. On the contrary, Mullen filed an untimely, unauthorized, *pro se* "Petition" in the United States District Court for the Western District of Missouri on October 27, 1980 alleging that the shares of Pension Life were actually worth $100 per share.

Upon motion, on April 16, 1982, the District Court granted summary judgment in favor of petitioners Academy Life and Beausang because of statutory language of the Insurance Merger Act, limiting Mullen's remedy to an appraisal proceeding in New Jersey. The Eighth Circuit Court of Appeals reversed the decision of the District Court, held that the appraisal remedy was not exclusive, and that Mullen was permitted to litigate the issue in the District Court in Missouri.

Your petitioners respectfully request that the decision of the Court of Appeals be reversed and judgment entered in their favor consistent with the opinion and order of the District Court. Jurisdiction in the court below was based upon diversity of citizenship. 28 U.S.C. §1332.

REASON FOR GRANTING THE WRIT

The Court of Appeals for the Eighth Circuit decided an important question of New Jersey corporate law, and corporate law in general, in conflict with applicable state corporate law and in a manner detrimental to the free management of corporate affairs.

In reversing a summary judgment entered in favor of petitioners in the District Court, the Eight Circuit has held, in effect, that a dissenting shareholder of a subsidiary insurer may invoke equity to contest a merger which complies in all respects with state law, (1) despite the existence of a full appraisal remedy; (2) where the only claim is inadequacy of valuation; (3) where the statute sets forth that appraisal in a state court proceeding is the exclusive remedy; and (4) where the merger had been approved by the Commissioner of Insurance for the situs state. The impact of this decision is far-reaching in that it apparently authorizes litigation by dissenting shareholders in any state or any federal district court in the country, at any time before or after any merger between a parent and subsidiary in a regulated industry, in any given state, on the issue of adequacy of valuation of shares.

Your petitioners respectfully contend that the ruling below permits a single unhappy shareholder to obfuscate, confound, and obstruct the desires of the majority of shareholders in a situation where the appraisal remedy is fully adequate to insure that the shareholder's rights are protected. As a practical matter, the situs jurisdiction is rendered powerless to supervise its own corporate affairs because various and perhaps conflicting appraisal-type proceedings can be held wherever and whenever a disgruntled shareholder may choose to object. This Court has often held that each state should be charged with supervising its own internal

corporate affairs. *Santa Fe Indus., Inc. v. Green,* 430 U.S. 462 (1977); *Cort v. Ash,* 422 U.S. 66 (1975).

The Circuit Court opinion is directly contrary to New Jersey law regarding corporate mergers in general. In relying extensively upon *Singer v. Magnavox Co.,* 380 A.2d 969 (Del. 1977), the Circuit Court held that a corporate "cash-out" merger of "freeze-out" must be fair to minority shareholders and must be supported by a "business purpose". The Circuit Court cited other authority for the general and undisputed proposition that strict compliance with the language of the applicable merger statute would not insulate an acquiring corporation from liability for fraud or its equivalent. *See Coleman v. Taub,* 638 F.2d 628 (3rd Cir. 1981). The *Singer* decision reflected an historic animosity that courts have understandably held for freeze-out mergers because of the potential for abuse of minority interests. Nonetheless, the *Singer* opinion ignored the practical problems inherent in installing a test of fairness to be complied with by the parent, and a requirement that all freeze-out mergers be proven to be for a stated "business purpose". The Circuit Court's analysis was well-intentioned but failed to distinguish between or among the various types of "freeze-out" mergers. There is also a basic flaw in applying *Singer* to the insurance industry which is strictly regulated by state statute.

Petitioners respectfully contend that the Circuit Court misconstrued the status of existing law regarding corporate mergers in regulated industries such as insurance and committed the following significant errors:

1. Because of the timing of the release of its opinion (March 2, 1983), the Circuit Court was apparently unable to consider *Weinberger v. UOP, Inc.,* No. 58, 1981 slip. op. (Del. Feb. 1, 1983) in which the Supreme Court of Delaware sharply curtailed the reach of *Singer* and redefined the "fairness" and "business

purpose" tests for cash-out mergers in recognition of the burden placed upon corporate activity by *Singer*. The *Weinberger* decision permits equitable intervention in cases where actual fraud is shown, but returns to the appraisal remedy as the "basic" form of remedy to a dissatisfied shareholder.

The *Weinberger* opinion had been foreshadowed by Judge Quillen's dissent in *Roland International Corp. v. Najjar,* 407 A.2d 1032 (Del. 1979) in which it was pointed out that the dissenting shareholder in an affiliate merger wanted to be "cashed-out" only at a higher price:

> "In short, the plaintiff comes to Court more than five months after the required notice to the corporation under the statutorily established appraisal procedures and says he wants more money for his shares and the privilege of subjecting the defendants to a separate class action. He does not specifically allege or even argue to any precision why the statutory appraisal procedure is inadequate in this case."

The matter at bar is factually similar in that Mullen also wants to be "cashed-out" only at $100 per share instead of $8 per share and he seeks no other remedy.

Weinberger cited *Stauffer v. Standard Brands Incorporated,* 187 A.2d 78 (Del. 1962), admitted that *Singer* had strayed from *Stauffer's* guiding principles, and reconfirmed *Stauffer's* authority, validity and applicability. In *Stauffer,* a short form merger between affiliated corporations was expressly approved because the dispute between the dissenting shareholder and the parent/acquiring corporation "reduces to nothing but a difference of opinion as to value". The court confirmed that mergers of affiliates can have desirable social results and stated that the *very purpose* of the

short form merger statute was to provide a means of eliminating the minority shareholder's interest in the enterprise. As in the case at bar, the shareholder in *Stauffer* was left with only a monetary claim for which the appraisal remedy was held to be entirely adequate. In addition, *Weinberger* eliminated the requirement that the parent show a business purpose in a merger of a parent and subsidiary. Since Mullen's claim can be reasonably interpreted only as relating to the amount of money which might be due him per share, the *Weinberger* decision should require a holding that the appraisal remedy is adequate. The most recent pronouncement of the Delaware Supreme Court on this issue constitutes a recognition that there is nothing inherently wrong with a cash-out merger of affiliates provided the minority shareholders are paid fair value. The focus of inquiry should be shifted from requiring a showing of a proper business purpose or absolute fairness in the entire transaction to all parties, to a more sophisticated analysis of the valuation scheme. In *Mills v. Electric Auto-Lite Co.*, 552 F.2d 1239 (1976), *cert. denied*, 434 U.S. 922 (1977), *reh. denied*, 434 U.S. 1002 (1977), a valuation procedure was affirmed where minority shareholders were provided a proportionate share of the increase in value of a joint enterprise (from synergism) over the value of the two corporations as they existed prior to the merger. This valuation question may be simply and easily tried within the confines of the appraisal proceeding. In its desire to protect the minority shareholder generally, the *Singer* court lost sight of the fact that if valuation is the only issue, appraisal is a full remedy. The *Singer* court invested the minority shareholder with rights which bore no reasonable relation to his ownership interest *vis a vis* the majority. Petitioners respectfully aver that in the absence of fraud, in affiliate mergers where the claim is valuation, the appraisal remedy should be deemed adequate and shareholders should not be permitted to delay merger proceedings with demands for injunctions or other equitable relief.

(2) The Circuit Court failed to draw a distinction among the three various types of mergers which are categorized as "freeze-outs" in nature. It has been persuasively argued that the standard of review should vary according to the type of merger involved. *See Singer v. Magnavox and Cash Take Out Mergers,* 64 Va. L. Rev. 1101 (1978). In Brudney and Chirelstein, *A Restatement of Corporate Freeze Outs,* 87 Yale L.J. 1354 (1978), the authors describe in detail the various types of freeze-out mergers and delineate the different standards which should be applied in evaluating each. In "two-step mergers", an unaffiliated corporation makes a tender offer which is accepted by more than 50% of the acquired company. Once a majority ownership of the acquired company is established in the free market, a merger is agreed to by both boards and is thereafter consummated. Minority shareholders are usually given shares in the parent or cash. As long as the tender offer value is the amount actually paid to dissenting shareholders, the free market and the self-interest of shareholders of each corporation are sufficient bases to guarantee a fair price. In mergers known as "going private" mergers, a controlling faction will attempt to force out minority owners for the sole purpose of divesting their ownership, and removing the corporation from the public domain. This type of "freeze-out" has been roundly criticized as being fundamentally unfair, and it has been suggested that it should be declared unlawful. *See Brudney and Chirelstein, supra* at 1367. In a "merger of affiliates", as in the case at bar, a business purpose if presumed and the appraisal remedy, absent fraud, is customarily deemed to be adequate and should in all cases be the extent of the shareholder remedy.

The Circuit Court first confirmed that there was no precedent directly on point, then placed its reliance upon the New Jersey case of *Berkowitz v. Power Mate Corp.,* 135 N.J. Super. 36 (1975) in speculating that if faced with this issue, a New Jersey court would most likely hold appraisal to be non exclusive. It was not

mentioned that *Berkowitz* involved a "going private" merger which is inherently suspect and which bears little, if any, relation to the insurance/affiliate merger involved in this case. The Circuit Court failed to consider that an affiliate merger will often benefit the parent and subsidiary and is generally an acceptable corporate undertaking. *See Blumenthal v. Roosevelt Hotel, Inc.*, 202 Misc. 988, 115 N.Y.S. 2d 52 (Sup. Ct. 1952) in which the court wrote "merely to seek to eliminate minority stockholders" does not raise "an issue of illegality." If the Circuit Court had drawn the distinction between the various types of freeze-out mergers, it could, and petitioners respectfully aver that it should have concluded that the affiliate merger in the matter at bar did not necessarily require an additional safeguard of an available remedy in equity, particularly where such a remedy could force a parent corporation to litigate the issue of valuation in any judicial district, either state or federal, in the country.

(3) The court failed to consider the specific language of the Insurance Merger Act, which is a "short form" statute. In the Insurance Merger Act, the State of New Jersey provides an elaborate statutory procedure for acquisition of capital stock of domestic insurance companies by other corporations. Section 6(2) of the Act sets forth that determination of fair value shall be made in accordance with the provisions of Sections 14A:11-6 through 14A:11-10 of the New Jersey Business Corporation Act. That portion of the New Jersey Business Corporation Act which indicates that equity will be available for fraud in long form mergers [N.J. Stat. Ann. §14A:11-5(22)] is specifically excluded from mention in the Insurance Merger Act. If valuation cannot be agreed upon by the parties, suit *only* in the New Jersey Superior Court is authorized. Limiting the site of litigation is sensible because New Jersey should be in control of its internal corporate affairs and because a merger is subjected to approval by the New Jersey Insurance Commissioner. It is submitted that a court of a foreign jurisdiction, such as Missouri, should exercise restraint in opining

that the language of a New Jersey statute should be supplanted because of case law originating principally in Delaware. If remedies in addition to the appraisal remedies were deemed appropriate by the New Jersey legislature, certainly it would have included them in the Act.

(4) The Circuit Court failed to consider that the approval of the Commissioner of Insurance is an independent guaranty of fairness of the overall transaction.

The two entities involved in the merger — Academy Life (the parent) and Pension Life (the subsidiary) are duly licensed and regulated insurance carriers and not standard business corporations. The Circuit Court's opinion does not contain any citation of insurance law. Further, the opinion deals solely with "freeze-out" mergers in a corporate context and does not consider that the business of insurance is subject to rules and regulations quite apart from standard business corporation laws. The State of New Jersey, and indeed every jurisdiction has a vigorously guarded interest in the control and regulation of insurance carriers. This regulation and control extends from the organization of insurance companies to their day-to-day operation in selling policies. Insurance companies are subjected to rigorous regulation and control in areas such as rate structuring, maintenance of capital reserves, licensing of representatives and dealing with policyholders to whom they owe a fiduciary duty. Business corporations are not subject to such regulations. Prior to the enactment of the Insurance Merger Act in 1971, insurance companies, were in New Jersey (and elsewhere), forbidden to merge. *See* 41 N.J.S.A. 14:12-1; *Personal Credit Plan v. Kling,* 130 N.J. Eq. 41 (1941). This law proved to be unduly restrictive. In order to protect the public from detrimental consequences of an insurance merger, the Insurance Commissioner of the State of New Jersey was given supervisory control over any acquisition, and the right to determine if it complied with the law.

In New Jersey, minority shareholders in an insurance corporation are protected from improper conduct by an acquiring corporation because the Insurance Commissioner of the State of New Jersey is required to study and pass upon all plans of acquisition which are submitted pursuant to the Insurance Merger Act. Section 17-27B-4(1) is as follows:

> "Upon adoption of the plan of acquisition, it shall be executed by the parent corporation under its corporate seal and submitted to the Commissioner who shall, within sixty days from the date of such submission, endorse thereon his approval or disapproval and notify the parent corporation thereof. The Commissioner in reviewing such plan of acquisition may employ such experts or consultants as he shall deem necessary. The reasonable cost of such experts and consultants are to be paid for by the parent corporation."

In authorizing the New Jersey Commissioner of Insurance to hire experts and require the parent corporation to pay for them, and in requiring general review and approval by the chief New Jersey Administrator for Insurance, the State of New Jersey has specifically provided for protection for the rights of minority shareholders. It is submitted that the review procedure which must be undertaken, which procedure is apart from standard corporate practice, is an adequate guarantee that the rights of minority shareholders will not be violated. It is further submitted that in order to acquire approval by the New Jersey Commissioner of Insurance, an appropriate purpose for the acquisition must be shown and fair value must be offered for all outstanding minority shares. Stated another way, it is respectfully urged that in the context of an insurance carrier regulated by the New Jersey Insurance Commissioner, approval of the Commissioner was meant to and does substitute for a showing of proper business

purpose and a separate showing of fiduciary protection for minority shareholders.

Petitioners accordingly urge the Court to consider that the cases cited in the Circuit Court's opinion are inapposite to a situation such as presented in this case in which a fiduciary responsibility of the acquiring corporation is supervised and controlled by a separate and specific administrative review. Because of the intervention of the New Jersey Insurance Commissioner, it is respectfully submitted that the appraisal remedy was intended by the legislature to be exclusive. To hold otherwise would be to subject the decision of the Insurance Commissioner to review by discontent shareholders and to essentially usurp his function.

When it is considered that the merger would first be submitted to the Insurance Commissioner for review, and since minority shareholder rights will thus be protected, the intended exclusivity of the appraisal remedy becomes plain. Once the approved plan is delivered to minority shareholders, "ownership of the shares to be acquired pursuant to the plan shall vest in the parent corporation". N.J. Stat. Ann. §17:27B-1(1). Thereafter "the parent corporation shall be entitled to have new certificates therefor registered in its name". N.J. Stat. Ann. §17:27B-5(1). The provision for immediate transfer of ownership of shares to the parent certainly is not consistent with a minority shareholder having a variety of remedies other than the appraisal remedy specifically provided for. After the shares have been acquired by the parent corporation:

> "Shareholders . . . shall thereafter retain only the right either to receive the consideration to be paid in exchange for their shares pursuant to the plan or to dissent from the plan and receive the fair value of their shares as hereinafter provided." N.J. Stat. Ann. §17:27B(2).

The exclusivity of remedy is reinforced by N.J. Stat. Ann. §17:27B(3) which *requires* the dissenting shareholder to submit his shares to the parent corporation no later than twenty (20) days after giving notice of dissent. And finally, as noted by the District Court, the dissenting shareholder shall "cease to have any rights of a shareholder" upon giving notice of dissent. N.J. Rev. Stat. §17:27B-6(2).

The specificity of the Insurance Merger Act reflects the legislature's recognition of the particular needs and goals of the insurance industry, and the Act's particular application only to situations wherein more than 95% of outstanding shares are owned by a parent company compels a conclusion that the appraisal remedy was intended to be exclusive.

In its regulation by state law, the insurance industry is analagous to the field of public utilities, where for many years, federal and state legislation has provided for elimination of minority interests for the overall public good. In Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Rights,* 77 Harv. L.R. 1189, 1198-1199 (1964), the author comments on the reasons for legislation providing for a cash-out option, particularly in affiliate mergers involving public utilities:

> "The existence of such minority holdings creates the danger that the minority will be unfairly treated, and, conversely, the difficulty and expense of ensuring that continuing intercompany transactions and allocations of overhead and other shared expenses will always be handled on a 'fair', arm's length basis. For many years federal and state legislation in the public utility field providing for compulsory elimination of minorities in subsidiary companies has provided the means of

meeting these disadvantages." *Vorenberg, supra,* pp. 1198-1199.

In summary, the New Jersey legislature provided a specific short form merger statute for subsidiary insurance companies which provided only for appraisal as a remedy for dissenting shareholders. The Insurance Merger Act requires a review and approval by the Insurance Commissioner which is in the public interest. The appraisal remedy was intended, under these circumstances, to be exclusive.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion and order of the Eighth Circuit.

Respectfully submitted,

WILLIAM J. BRENNAN

BUTERA, BEAUSANG,
MOYER & COHEN
Attorneys for Petitioners

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term 1982

No. 82-1600-WM

Leo M. Mullen, M.D.,

Appellant,

vs.

Academy Life Insurance Company,

Appellee.

Appeal from the United States District Court for the Western District of Missouri

Petition of appellee for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

March 23, 1983

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-1600

Leo M. Mullen, M.D.,

Appellant,

v.

Academy Life Insurance Company and Michael F. Beausang, Jr.,

Appellees.

Appeal from the United States District Court for the Western District of Missouri

Submitted: February 25, 1983

Filed: March 2, 1983

Before HEANEY, McMILLIAN, and ARNOLD, Circuit Judges.

PER CURIAM.

Dr. Leo Mullen appeals from the decision of the District Court granting summary judgment to the defendant, Academy Life Insurance Company (Academy Life), in Mullen's action challenging the terms for the acquisition of Pension Life Insurance Company (Pension Life) by its parent company, Academy Life. Mullen is a minority stockholder of Pension Life who filed suit to contest the valuation of his shares under Academy Life's Plan of Acquisition. The District Court held that under the law of New Jersey, where Pension Life is incorporated, Mullen's sole recourse

was to file an appraisal action in the Superior Court of New Jersey, and that "collateral attack" in a federal court was not available. We hold that appraisal is not necessarily a minority stockholder's exclusive remedy under New Jersey law, and that the New Jersey statute should not be construed to foreclose the exercise of federal diversity jurisdiction. We therefore reverse.

I.

During 1964, Dr. Mullen, a citizen of Missouri, acquired 695 shares of Pension Life, an insurance company incorporated in New Jersey. Some years later Academy Life, the parent company and owner of over 500,000 shares of Pension Life, decided to eliminate the minority interest in Pension Life. In 1977 Academy Life purchased 8,950 shares from minority stockholders at $8.00 per share. In 1980 Academy Life attempted to acquire the remaining outstanding stock of Pension Life, totalling some 13,745 shares, by proceeding under a New Jersey statute which establishes a short-form merger procedure for parent companies to acquire subsidiary insurance companies. See N.J. Stat. Ann. §§17:27B-1 to -6 (West Supp. 1982-1983). Accordingly, Academy Life filed a Plan of Acquisition of Minority Shares with the New Jersey Insurance Commissioner and proposed a purchase price of $8.00 per share. The Commissioner approved the Plan effective August 13, 1980.

In September of 1980, Academy Life sent notice of its Plan to all minority stockholders. The notice included information about the appraisal rights of dissenting stockholders under N.J. Stat. Ann. §§14A:11-1 to -11 (West 1969 & Supp. 1982-1983) and instructed dissenting stockholders to invoke the appraisal process within 30 days or lose their right to contest the valuation of their shares. Upon receiving the notice, Mullen responded with a notice of dissent on September 14, 1980. He did not pursue his statutory

rights by initiating appraisal proceedings in the courts of New Jersey, but instead filed a pro se "Petition" in the District Court on October 27, 1980, alleging that his stock was worth considerably more than the $8.00 per share offered under the Plan. In his Petition, Mullen made general reference to the value of Pension Life as evidenced by its annual statement, and then asserted that he was entitled to $100 per share.

After some discovery, on October 23, 1981, Academy Life moved for summary judgment on a variety of grounds. The District Court accepted Academy Life's argument that exclusive jurisdiction over the subject matter of Mullen's action resided in the New Jersey Superior Court in a statutory appraisal proceeding. Accordingly, the District Court granted Academy Life's motion for summary judgment on April 16, 1982. This appeal followed.

II.

At issue on this appeal is whether the District Court correctly concluded that a minority stockholder in a New Jersey insurance company who wishes to contest a merger under N.J. Stat. Ann. §§17:27B-1 *et seq.* may seek redress only in an appraisal proceeding in the New Jersey Superior Court. The District Court's opinion may be separated into two component holdings: first, that a minority stockholder such as Mullen is limited to his appraisal remedy, and second, that the New Jersey Superior Court has sole jurisdiction over appraisal proceedings, to the exclusion of federal diversity jurisdiction.[1] We examine each component in turn.

---

1. In his appellate brief, Mullen asserts that his action is based on federal securities law. We do not consider this argument, which is raised for the first time on appeal. Instead, we find diversity, 28 U.S.C. §1332, to be the

(Cont'd)

Appendix B

Exclusiveness of appraisal

The exclusiveness of a minority stockholder's appraisal right in the context of a corporate "freezeout"[2] has been the subject of a developing body of case law[3] and commentary[4] in recent years. These and other authorities suggest that majority stockholders owe minority stockholders a fiduciary duty which is independent of statute and which may be enforced in an action other than a statutory proceeding. In *Singer v. Magnavox Co.*, 380 A.2d 969, 979 (Del. 1977), the Delaware Supreme Court held that a merger which complies with all statutory formalities may be found illegal in an equitable proceeding if it is unfair to the

---

(Cont'd)
jurisdictional basis relied on by Mullen in the District Court. Academy Life admitted Mullen's allegation that he resides in and is a citizen of Missouri, and that Academy Life is a Colorado insurer with headquarters in Pennsylvania. In addition, Mullen requested well over $10,000 in damages, although Academy Life contends that $5,560 (695 shares at $8/share) is the total amount in controversy. Michael F. Beausang, Jr., the co-defendant, appears to be a citizen of Pennsylvania.

2. A "freezeout" occurs when the majority stockholders of a corporation eliminate all minority stockholders either through merger or some other mechanism.

3. See, *e.g.*, *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977); *Berkowitz v. Power/Mate Corp.*, 135 N.J. Super. 36, 342 A.2d 566 (1975). Although New Jersey law governs the Pension Life acquisition, we discuss Delaware case law as well, because of Delaware's position as a leader in the field of corporate law. The courts of other states commonly look to Delaware law (and, to a lesser degree, to the law of New Jersey) for aid in fashioning rules of corporate law.

4. See, *e.g.*, Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, 87 Yale L.J. 1354 (1978); Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 Harv. L. Rev. 1189 (1964).

minority. As the Third Circuit explained in *Coleman v. Taub*, 638 F.2d 628 (3d Cir. 1981), "[C]ompliance with the letter of the Delaware merger statutes ought not to insulate the fiduciaries' acts from scrutiny as to the purpose of the freeze-out. To do so would be to consign the minority to an appraisal proceeding for vindication of its entire right to corporate participation." *Id.* at 635 (footnote omitted). *Singer* involved a long-form merger, but in *Roland International Corp. v. Najjar*, 407 A.2d 1032 (Del. 1979), the Delaware Supreme Court made it clear that fiduciary-duty principles apply to short-form mergers as well.

If Academy Life had proceeded under New Jersey's general merger statute, Mullen clearly would not be limited to his appraisal right. In *Berkowitz v. Power/Mate Corp.*, 135 N.J. Super. 36, 342 A.2d 566 (1975), the New Jersey Superior Court recognized the right of minority stockholders to sue majority stockholders for breach of fiduciary duty in connection with a merger under N.J. Stat. Ann. §§14A:10-1 to -12 (West 1969 & Supp. 1982-1983). Moreover, the New Jersey dissent provisions themselves deny that appraisal is exclusive. See N.J. Stat. Ann. §14A:11-5(2) ("[T]his subsection [concerning appraisal rights] shall not exclude the right of such dissenting shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is ultra vires, unlawful or fraudulent as to such dissenting shareholder.").

Academy Life did not follow New Jersey's general long-form or short-form merger statute, but instead chose to use N.J. Stat. Ann. §§17:27B-1 *et seq.*, which establishes a separate, alternative short-form merger procedure for a parent company owning at least 95% of the stock of a New Jersey insurance company to acquire 100% ownership. Academy Life argues that section 17:27B-6, which addresses dissenters' rights, does not allow for

remedies other than appraisal. See N.J. Stat. Ann. §17:27B-6(2) ("Upon giving such notice, the dissenting shareholder shall cease to have any rights of a shareholder, except the right to be paid the fair value of his share . . ."). Section 17:27B-6 incorporates many of the dissent provisions from the general merger statute, but it does not specifically incorporate N.J. Stat. Ann. §14A:11-5(2), which makes appraisal non-exclusive. The omission may have been inadvertent, or it may have been an intentional effort to make dissenters' appraisal rights exclusive in the acquisition of subsidiary insurance companies. The statutory language is not conclusive, and there are no New Jersey cases specifically construing the insurance-company acquisition statute.

Berkowitz gives a strong indication of how the New Jersey courts might respond if asked whether appraisal is exclusive under N.J. Stat. Ann. §17:27B-6. The *Berkowitz* opinion does not rely on the language of the particular merger statute being used for the freezeout, but instead phrases the issue in terms of the powers of equity to intervene where statutory requirements have been met but statutory remedies are inadequate. Accordingly, we conclude that New Jersey would be more likely to follow the lead of courts which have held appraisal not to be exclusive in fact, even where the applicable statutes apparently specify appraisal as the exclusive remedy for dissenters. See, *e.g.*, *Lachman v. Bell*, 353 F. Supp. 37, 41-42 (S.D.N.Y. 1972) (existence of appraisal as exclusive statutory remedy under Delaware merger law does not foreclose suit in equity); *Miller v. Steinbach*, 268 F. Supp. 255, 270-71 (S.D.N.Y. 1967) (exclusivity of appraisal under Pennsylvania merger law relates only to mergers not tainted by fraud); *Weckler v. Valley City Mill. Co.*, 93 F. Supp. 444, 455 (W.D. Mich. 1950) (phrase "exclusive remedy" in Michigan appraisal statute relates only to good-faith sales), *aff'd per curiam*, 188 F.2d 367 (6th Cir. 1951). *But see Yanow v. Teal Industries*,

Inc., 178 Conn. 262, 269-80, 422 A.2d 311, 316-21 (1979) (appraisal right held to be exclusive remedy to attack merger).[5]

Although Mullen's Petition is very conclusory, it may be characterized as a complaint that Academy Life violated its fiduciary duty to him by undervaluing his shares in its Plan of Acquisition. Other jurisdictions have formulated certain limitations on actions for breach of fiduciary duty, but they would not preclude consideration of Mullen's complaint. For example, in New York, a stockholder who exercises his appraisal rights may not later maintain an action for breach of fiduciary duty. *Breed v. Barton*, 54 N.Y.2d 82, 444 N.Y.S.2d 609, 429 N.E.2d 128 (1981). New Jersey does not appear to have adopted this position, and in any case the only step Mullen took in the appraisal process was to send notice of dissent, which hardly constitutes an exercise of his appraisal rights. It might be argued that Mullen's Petition, which asks only for money damages, is nothing more than an untimely and improper attempt to commence an appraisal proceeding inconsistent with the New Jersey statute. A similar argument was made in *Roland International Corp. v. Najjar, supra*, but only the dissenting justice accepted it. 407 A.2d at 1039-40. The majority, in contrast, permitted the minority stockholder plaintiff to proceed with his equitable action for breach of fiduciary duty even though he requested only the fair value

---

5. One commentator noted that the Connecticut statute is "unusually explicit in making the [appraisal] remedy exclusive." Manning, *The Shareholder's Appraisal Remedy*, 72 Yale L.J. 223, 247 n.38 (1962). The statute provides that "[w]here the right to be paid the value of shares is made available to a shareholder by this section, such remedy shall be his exclusive remedy as holder of such shares against the corporate transactions described in this section, whether or not he proceeds [with an appraisal action]." Conn. Gen. Stat. §33-373(f) (1981). The New Jersey statute is less explicit.

of his shares as a remedy, which he presumably could also have gained through an appraisal action.

Exclusiveness of state court's jurisdiction

The District Court held not only that Mullen was limited to his statutory appraisal remedy, but that in addition he was limited to the venue specified by N.J. Stat. Ann. §14A:11-8 ("In any action to determine the fair value of shares pursuant to this Chapter: (a) The Superior Court shall have jurisdiction . . ."). The effect of the District Court's deference to the statute conferring jurisdiction on the New Jersey Superior Court is to allow New Jersey to divest the District Court of a portion of its diversity jurisdiction. Such a result runs contrary to the long-established rule that states may not limit federal jurisdiction by passing restrictive statutes. As the Supreme Court explained in *Railway Co. v. Whitton's Administrator,* 13 Wall. 270, 286 (1871):

> Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation.

See also *Duchek v. Jacobi,* 646 F.2d 415, 419 (9th Cir. 1981) (state may not preclude federal courts from enforcing state judgments); *Greyhound Lines, Inc. v. Lexington State Bank & Trust Co.,* 604 F.2d 1151, 1154-55 (8th Cir. 1979) (Nebraska legislature's decision to place exclusive jurisdiction over claims against estates in county courts does not abrogate federal diversity jurisdiction); *Kanouse v. Westwood Obstetrical & Gynecological Associates,* 505 F. Supp. 129, 129 (D.N.J. 1981) (state statute cannot divest district court of diversity jurisdiction over medical malpractice claims). If the

New Jersey statute is construed to exclude the jurisdiction of federal courts, a serious constitutional question would arise. This consideration furnishes an additional reason not to interpret the New Jersey statutory procedure as exclusive.

III.

We can understand the District Court's reluctance to intervene in a dispute regarding the internal affairs of a New Jersey corporation. In addition, many of the authorities we have relied on were not cited to the District Court. We nevertheless conclude, for the reasons given in this opinion, that the New Jersey statute should not be construed as an attempt to oust the District Court of a portion of its statutory diversity jurisdiction. The judgment is reversed, and the cause remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Filed April 16, 1982

No. 80-0955-CV-W-7

LEO M. MULLEN, M.D.,

Plaintiff,

vs.

ACADEMY LIFE INSURANCE CO., et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

Plaintiff, a Missouri resident, purchased a total of 695 shares of stock in Pension Life Insurance Company, a New Jersey insurer, at various times in 1964. Defendant Academy Life Insurance Company is a Colorado insurer with its "principal administrative office" in Valley Forge, Pennsylvania. As of June 30, 1980, Academy Life owned all but 13,745 shares of the common stock of Pension Life. In an effort to acquire such shares, Academy Life filed a Plan of Acquisition of Minority Shares with the Insurance Commissioner of the State of New Jersey. The Plan provided for payment of $8.00 per share and was approved by

the commissioner, effective August 13, 1980. Plaintiff has not exercised any rights available to him under the Plan. Rather, plaintiff, proceeding *pro se*, filed a complaint in this Court against Academy Life, et al. on October 27, 1980 which apparently contests the Plan and the valuation of shares at $8.00 per share.

Defendants have filed a motion for summary judgment which raises several critical issues. The Court finds that the Plan of Acquisition is not subject to collateral attack in the instant action and accordingly defendant's motion is granted.

The State of New Jersey provides an elaborate statutory procedure for acquisition of capital stock of domestic insurance companies by other corporations. 17 N.J.S.A. §27B-1, *et seq.* Pension Life is a New Jersey insurance company and the acquisition of its capital stock by Academy Life is governed by the statutory procedure. If a minority shareholder disagrees with an approved valuation of his shares, his remedy is to follow the procedures outlined in the Act:

> (2) upon giving such notice [of dissent and demand for payment], the dissenting shareholder shall cease to have any rights of a shareholder, except the right to be paid the fair value of his shares . . . Such determination of fair value shall be made in accordance with the provisions of sections 14A:11-6 through 14A:11-10 of the New Jersey Business Corporation Act. 17 N.J.S.A. §27-B-6(2).

The New Jersey Business Corporation Act provides for a valuation procedure. If valuation cannot be agreed upon by the parites, suit in the New Jersey Superior Court is authorized. N.J.S.A. §14A:11-7(1) and (2). The jurisdictional section of the Act is as follows:

Appendix C

In any action to determine the fair value of shares pursuant to this Chapter:

(a) The Superior Court shall have jurisdiction and may proceed in the action in a summary manner or otherwise;

(b) *All dissenting shareholders, wherever residing*, except those who have agreed with the corporation upon the price to be paid for their shares, *shall be made parties thereto* as an action against their shares quasi in rem;

(c) The court in its discretion may appoint an appraiser to receive evidence and report to the court on the question of fair value, who shall have such power and authority as shall be specified in the order of his appointment; and

(d) The court shall render judgment against the corporation and in favor of each shareholder who is a party to the action for the amount of the fair value of his shares. 14A N.J.S.A. §11-8 (Emphasis added.)

Thus, procedures for review of the Plan of Acquisition authorized by the state insurance commissioner are statutorily provided. The statute does not contemplate review by a federal court. The court in *Niesz v. Gorsuch*, 295 F.2d 909 (9t Cir. 1961), held that a corporate merger approved by the state director of insurance could be attacked only in a direct action and not collaterally. Likewise, the Plan of Acquisition herein can be attacked only in a direct action as provided by statute and not collaterally as in the instant action.

An administrative order cannot be collaterally attacked unless the agency acted in excess of its jurisdiction or unless there was such fraud or mistake as would justify the reopening of a

judgment. *In re Hooper's Estate*, 359 F.2d 569 (3d Cir. 1966). Plaintiff alleges no such fraud, mistake or lack of jurisdiction. Application of the rule against collateral attack is particularly appropriate where, as here, a direct review proceeding was provided by statute. *Pearson v. Walling*, 138 F.2d 655 (8th Cir. 1943). Plaintiff's failure to follow the direct review proceeding provided by N.J.S.A. §14A:11-8 precludes collateral attack in this Court.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted.

s/ John R. Gibson
John R. Gibson, Circuit Judge
Sitting by Designation

Dated: April 16, 1982.

APPENDIX D — THE INSURANCE MERGER ACT

CHAPTER 27B. ACQUISITION OF CAPITAL STOCK OF DOMESTIC INSURANCE COMPANIES BY OTHER CORPORATIONS [NEW]

17:27B-1. Definitions

As used in this act,

(2) [1]"Domestic insurer" means a stock insurance company organized under the laws of this State;

(2) "Parent corporation" means a corporation organized for any purpose under any law of this State or any other jurisdiction, which owns directly or indirectly at least 95% of the aggregate issued and outstanding shares of all classes of voting stock of a domestic insurer;

(3) "Subsidiary insurer" means a domestic insurer so owned by a parent corporation; and

(4) "Commissioner" means the Commissioner of Insurance of New Jersey.

L.1971, c. 132 §1, eff. May 6, 1971.

[1] So in enrolled bill.

Title of Act:

An Act concerning the acquisition by a corporation of minority interests in subsidiary domestic insurance companies. L.1971, c. 132.

17:27B-2. Acquisition of minority interests

(1) Any parent corporation may, in the manner hereinafter prescribed, acquire all of the issued and outstanding shares of

voting stock of its subsidiary insurer not owned by the parent corporation.

(2) The method authorized by this act for acquiring shares of a subsidiary insurer is not exclusive, but is in addition to any other lawful method for the acquisition of such shares.

L.1971, c. 132, §2, eff. May 6, 1971.

17:27B-3. Plan of acquisition

(1) The board of directors of the parent corporation which seeks to acquire the minority interests in its subsidiary insurer shall adopt a plan for such acquisition.

(2) The plan of acquisition shall set forth:

(a) The name of the subsidiary insurer;

(b) The total number of issued and outstanding shares of each class of voting stock of the subsidiary insurer, the number of its shares owned by the parent corporation and, if either of the foregoing is subject to change prior to the effective date of acquisition, the manner in which any change may occur;

(c) The terms and conditions of the plan, including the manner and basis of exchanging the shares to be acquired for shares or other securities of the parent corporation, for cash, other consideration or any combination of the foregoing, the proposed effective date of acquisition, and a

statement clearly describing the rights of shareholders dissenting from the plan;

(d) If the parent corporation is not authorized to do business in this State, its consent to the enforcement against it in this State of the rights of shareholders pursuant to the plan or the rights of shareholders dissenting from the plan, and a designation of the commissioner as the agent upon whom process may be served against the parent corporation in any action or proceeding to enforce any such rights; and

(e) Such other provisions with respect to the plan as the board of directors of the parent corporation deems necessary or desirable, or as the commissioner may prescribe.

L.1971, c. 132, §3, eff. May 6, 1971.

17:27B-4. Submission of plan of acquisition to commissioner

(1) Upon adoption of the plan of acquisition, it shall be executed by the parent corporation under its corporate seal and submitted to the commissioner who shall, within 60 days from the date of such submission, endorse thereon his approval or disapproval and notify the parent corporation thereof. The commissioner in reviewing such plan of acquisition may employ such experts or consultants as he shall deem necessary. The reasonable costs of such experts and consultants are to be paid for by the parent corporation.

(2) The commissioner shall approve the plan if he is satisfied that it complies with this act and is not inconsistent with law.

If the commissioner disapproves the plan, he shall advise the parent corporation in writing of the reasons for such disapproval. No plan shall take effect unless the approval of the commissioner has been obtained.

(3) The commissioner's disapproval of a plan of acquisition shall be subject to review, hearing and relief in the Superior Court in a proceeding in lieu of prerogative writ.

L.1971, c. 132, §4, eff. May 6, 1971.

17:27B-5. Delivery of plan to minority shareholders; acquisition of shares

(1) If the commissioner approves the plan, the parent corporation shall deliver a copy of the plan or a summary thereof approved by the commissioner to each person who, as of the date of delivery, is a holder of record of stock to be acquired pursuant to the plan. Such delivery shall be made either in person or by depositing a copy of the plan or the approved summary in the United States mails, postage prepaid, addressed to the shareholder at his address of record. On or before the date of acquisition proposed in the plan, the parent corporation shall file with the commissioner a certificate executed by its president or vice president and attested by its secretary or assistant secretary under the seal of the parent corporation, attesting to compliance by the parent corporation with this subsection (1);

(2) Upon compliance with the foregoing requirements, ownership of the shares to be acquired pursuant to the plan shall vest in the parent corporation on the date of acquisition proposed in the plan, whether or not the certificates for such shares have been surrendered for exchange, and the parent corporation shall be entitled to have new certificates therefor registered in its name.

Shareholders whose shares have been so acquired shall thereafter retain only the right either to receive the consideration to be paid in exchange for their shares pursuant to the plan or to dissent from the plan and receive the fair value of their shares as hereinafter provided.

L.1971, c. 132, §5, eff. May 6, 1971.

17:27B-6. Rights of dissenting shareholders

(1) Within 30 days after delivery of the plan or a summary thereof pursuant to subsection (1) of section 5, any shareholder of the subsidiary insurer to whom the parent corporation was required to make such delivery may give to the parent corporation written notice of his dissent from the plan and of his demand for payment of the fair value of his shares.

(2) Upon giving such notice, the dissenting shareholder shall cease to have any rights of a shareholder, except the right to be paid the fair value of his shares, determined as of the day prior to the day on which the plan of acquisition was adopted by the parent corporation and excluding any appreciation or depreciation resulting from such action. Such determination of fair value shall be made in accordance with the provisions of sections 14A:11-6 through 14A:11-10 of the New Jersey Business Corporation Act, all references therein to a demand pursuant to subsections 14A:11-2(3), 14A:11-2(4) or 14A:11-2(5) being deemed for such purpose to include a notice of dissent and demand made pursuant to subsection (1) of this section 6.

(3) Not later than 20 days after giving notice of his dissent and demand for payment as aforesaid, each dissenting shareholder shall submit the certificate or certificates representing his shares to the parent corporation for notation as provided in subsection

Appendix D

14A:11-2(6) of the New Jersey Business Corporation Act, the effect of which notation shall be as specified in said subsection.

L. 1971, c. 132, §6, eff. May 6, 1971.